104

No. 07-984 and 07-990

FILED
SEP 24 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER, COEUR ALASKA, INC.

WILLIAM PERRY PENDLEY*
**Counsel of Record*
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for discharges of "fill material" provided that the discharges comply with that section's water-quality requirements, which are jointly developed by the Corps of Engineers and the Environmental Protection Agency. 33 U.S.C. § 1344(a), (b)(1). By regulation, the Corps of Engineers and the EPA have jointly defined "fill material" generally as any material that has the net effect of raising the bottom elevation of a water of the United States, including specifically "slurry, or tailings or similar mining-related materials," 33 C.F.R. § 323.2(e)-(f); 40 C.F.R. § 232.2.

In this case, the Ninth Circuit held that the Corps of Engineers lacked authority under Section 404 to issue a permit for the discharge of fill material whenever the discharge implicates any effluent restriction promulgated by the EPA as part of its permit program under Section 402 of the Act. On that basis, the Ninth Circuit invalidated a Section 404 discharge permit issued to Petitioner Coeur Alaska, Inc.

The question presented is whether the Ninth Circuit erred in rejecting the expert agencies' joint interpretation of the Act that effluent restrictions promulgated as part of the EPA's Section 402 permit program do not apply to discharges of fill material permitted by the Corps of Engineers under Section 404.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	6
ARGUMENT	7
I. THE NINTH CIRCUIT FAILED TO ACKNOWLEDGE THAT THE TEXT OF SECTION 402 AND SECTION 404 OF THE CWA PROVIDES FOR SEPARATE AND DISTINCT PERMITTING PROCESSES	7
A. The Text Of Section 402 Reveals That Section 402 And Section 404 Are Mutually Exclusive	10
B. The Text Of Section 404 Reveals That Section 402 And Section 404 Are Mutually Exclusive	12
II. THE NINTH CIRCUIT DECISION MUST BE REVERSED; IT VIOLATED TWO WELL-ESTABLISHED TENETS OF ADMINISTRATIVE LAW	13

TABLE OF CONTENTS – Continued

Page

A. By Rejecting The Agencies' Interpretation Of The CWA And Effectively Rewriting The Regulation, The Ninth Circuit Decision Conflicts With *Chevron* 15

1. *Chevron* requires deference to accountable agencies 15

2. The instant case is on all fours with *Chevron*, requiring deference from the Ninth Circuit 18

B. By Rejecting The Corps' Interpretation Of Its Own Regulation, The Ninth Circuit Decision Conflicts With This Court's Holding In *Seminole Rock* 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Auer v. Robbins, 519 U.S. 452 (1997) 22

Boise Cascade Corp. v. EPA, 942 F.2d 1427 (9th Cir. 1991) 12

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) ..... *passim*

Brown v. United States, 113 U.S. 568 (1885) 10, 15

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984) ..... *passim*

Christensen v. Harris County, 529 U.S. 576 (2000) 22

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, ___ U.S. ___, 2008 WL 243678 (2008) 5

Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 6, 10

De Sylva v. Ballentine, 351 U.S. 570 (1956) 9

Entergy Services, Inc. v. FERC, 375 F.3d 1204 (D.C. Cir. 2004) 24

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 6

Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004) 11, 12

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 6, 10

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) 20

TABLE OF AUTHORITIES – Continued

Page

Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336 (2001) 2

National Ass'n of Home Builders v. Defenders of Wildlife, ___ U.S. ___, 127 S.Ct. 2518 (2007) 6, 10, 17, 21

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 1

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) 22

Rapanos v. United States, 547 U.S. 715 (2006) 2, 11

Ratzlaf v. U.S., 510 U.S. 135 (1994) 12, 24

Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985) 2

Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005), *cert. denied*, 547 U.S. 1065 (2006) 2

Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, 486 F.3d 638 (9th Cir. 2006) ..... *passim*

Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, No. 05-cv-00012-J-JKS, slip op. (D.Alaska Aug. 4, 2006) 4

Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994) 22

United States v. Fisk, 70 U.S. 445 (1865) 9

United States v. Hagberg, 207 F.3d 569 (9th Cir. 2000) 24

TABLE OF AUTHORITIES – Continued

Page

United States v. Larionoff, 431 U.S. 864 (1977).....22

United States v. Shimmer, 367 U.S. 374 (1961) ...15, 16

Wards Cove Packing Corp. v. National Marine Fisheries Service, 307 F.3d 1214 (9th Cir. 2002).....22

Watt v. Alaska, 451 U.S. 259 (1981).....12

STATUTES

5 U.S.C. § 701 *et seq.* 14

33 U.S.C. § 1311(a) 7, 9

33 U.S.C. § 1311(e) 8, 9, 10

33 U.S.C. § 1316(e) 8, 9, 10

33 U.S.C. § 1342(a)(1).....8, 10, 11

33 U.S.C. § 1343(c) 18

33 U.S.C. § 1344(a) 8

33 U.S.C. § 1344(b) 18

33 U.S.C. § 1344(b)(1).....8

33 U.S.C. § 1344(p) 12, 13

Clean Water Act, 33 U.S.C. §§ 1251-1387 1

Clean Water Act, Section 301 (33 U.S.C. § 1311).....5, 6, 8, 12, 20

Clean Water Act, Section 306 (33 U.S.C. § 1316) 5, 8

TABLE OF AUTHORITIES – Continued

Page

Clean Water Act, Section 402 (33 U.S.C. § 1342) ..... *passim*

Clean Water Act, Section 404 (33 U.S.C. § 1344) ..... *passim*

REGULATIONS

33 C.F.R. § 323.2(e) 13, 23

33 C.F.R. § 323.2(f) 13

40 C.F.R. § 122.3 14

40 C.F.R. § 232.2 13

OTHER AUTHORITIES

67 Fed. Reg. 31,129 (May 9, 2002) 13, 14

Scott H. Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 70-71 (2000) 22, 23, 24

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner, Coeur Alaska, Inc., in Case No. 07-984.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has been active in litigation to ensure the proper interpretation and application of the Clean Water Act, 33 U.S.C. §§ 1251-1387. *See, e.g., National Wildlife Federation*

[1] In compliance with Supreme Court Rule 37(6), MSLF represents that the parties have consented to the filing of this brief. All petitioners and respondents, except for the United States, have filed letters with the Clerk of the Court consenting to the filing of *amicus* briefs. The United States' letter of consent is being filed with this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) (*amicus curiae*); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented plaintiff); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), *cert. denied*, 547 U.S. 1065 (2006) (*amicus curiae*); *Rapanos v. United States*, 547 U.S. 715 (2006) (*amicus curiae*); *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638 (9th Cir. 2006) (*amicus curiae*).

In addition, MSLF has over 5,000 members throughout the United States, hundreds of whom own businesses and/or property in Alaska, California, Oregon, Washington, Idaho, Montana, Arizona, Nevada, and Hawaii, the States affected by the Ninth Circuit's erroneous decision that interprets the Clean Water Act as prohibiting any discharge of pollutants. Because Congress expressly provided for the regulated discharge of pollutants under the permit regimes established in the Clean Water Act, MSLF respectfully submits this *Amicus Curiae* Brief in support of Petitioner Coeur Alaska.

STATEMENT OF THE CASE

The "Kensington Project" of Coeur Alaska, Inc., is a proposed underground gold mine that would be

located approximately 40 miles north of Juneau, Alaska.[2] J.A. 317a; 249a. The mine is at the location of the historic Kensington mine, which operated from 1897 to 1928. Pet'r Coeur Alaska Br. 5. On June 17, 2005, the U.S. Army Corps of Engineers ("Corps") issued a permit, under Section 404 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1344, that allows Coeur Alaska to discharge 1,440 tons of mine tailings per day, in slurry form, into an impoundment in Lower Slate Lake. J.A. 266a. The Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (hereinafter collectively "SEACC") filed a lawsuit in the U.S. District Court for the District of Alaska seeking, *inter alia*, to hold unlawful and set aside the Section 404 permit. Pet'r Coeur Alaska Br. 8. SEACC claimed that the permitting process should have been conducted under the more stringent requirements contained in Section 402 of the CWA, 33 U.S.C. § 1342. *Id.*

Shortly after this suit was filed, because the Corps had decided to suspend the permit and reconsider its decision, the Corps moved for a voluntary remand, which was granted by the District Court on November 14, 2005. J.A. 524a. On March 29, 2006, the Corps issued a revised Record of Decision, which further explained its rationale for issuing the permit, and reinstated the permit. *Id.*

---

[2] Coeur Alaska, Inc., is a wholly owned subsidiary of Coeur d'Alene Mines Corporation.

On August 4, 2006, after the case had been reopened in light of the Corps' revised Record of Decision, the District Court granted judgment in favor of the Corps and Coeur Alaska. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, No. 05-cv-00012-J-JKS, slip op. (D.Alaska Aug. 4, 2006). J.A. 524a. The District Court held that it had to defer to the Corps' definition of "fill material" under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). J.A. 524a. Subsequently, SEACC moved the Ninth Circuit for an injunction pending appeal, which was granted on August 24, 2006. *Id.*

After the parties briefed the merits of the appeal, the Ninth Circuit reversed the District Court's decision and remanded with instructions to vacate the Corps' permit. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638, 651, n.12 (9th Cir. 2007). In so doing, the Ninth Circuit acknowledged that SEACC was not challenging the validity of the Corps' and the Environmental Protection Agency's ("EPA") joint regulations, which defined "fill material" and "discharge of fill material." *Id.* at 651, n.12 ("[W]e do not reach the validity of the regulations."). The Ninth Circuit also repeatedly acknowledged that the proposed discharge "facially" satisfied the plain language of the Corps' regulatory definition of the term "fill material." *Id.* at 644 (The discharge "facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake."); *id.* at 655 ("[T]he discharge in this case

facially qualifies for the permitting scheme under § 404 of the [CWA]. . . . ").

Despite these acknowledgements, the Ninth Circuit rejected the Corps' interpretation and application of the regulations promulgated to implement Section 404. Instead, it determined that Section 404 was "a limited permit program" that was not meant to apply to the "discharge of pollutants from industrial or municipal sources." *Id.* at 646. This was especially true, the Ninth Circuit explained, "when the EPA has adopted an effluent limitation or performance standard applicable to the relevant source of pollution." *Id.* at 647. Because the EPA previously had promulgated a performance standard, pursuant to Sections 301 and 306 of the CWA, that prohibits discharges from froth-flotation mills, such as Coeur Alaska's, the Ninth Circuit ruled that the Corps violated the CWA when it issued a Section 404 permit to Coeur Alaska. *Id.* at 655.

On October 29, 2007, the Ninth Circuit denied Coeur Alaska's Petition for Rehearing *En Banc*. J.A. 552a. On November 14, 2007, however, the Ninth Circuit did stay issuance of the mandate pending the filing and disposition of a petition for writ of certiorari. J.A. 554a. On January 28, 2008, Coeur Alaska filed a Petition for a Writ of Certiorari with this Court, which was granted on June 27, 2008, and consolidated with a related petition filed by the State of Alaska. *Coeur Alaska, Inc. v. Southeast Alaska*

Conservation Council, ___ U.S. ___, 2008 WL 243678 (2008).

SUMMARY OF THE ARGUMENT

The Ninth Circuit decision cannot be allowed to stand because it blatantly violates two fundamental, well-settled principles of statutory and regulatory construction. First, it is beyond refute that statutes must be interpreted by analyzing the statutory text as a whole. *National Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S.Ct. 2518, 2534 (2007); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989))). As such, a court must "interpret the statute 'as a symmetrical and coherent regulatory scheme,'" *id.* (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

In its analysis, however, the Ninth Circuit focused its attention on Congress' use of the word "and" instead of the word "or" in Section 301 of the CWA. In so doing, it ignored other, more definitive and less ambiguous language that appears in both Section 402 and Section 404 of the CWA. When this language is considered as a "coherent regulatory scheme," it is

clear that the District Court decision should have been upheld.

Second, it is a well-settled tenet of administrative law that a court must defer to an agency's interpretation of a statute unless the agency's action constitutes an unreasonable interpretation of an ambiguous statute. *Chevron*, 467 U.S. at 842-844. Similarly, a court must defer to an agency's interpretation of its own regulation unless it is "plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). The Ninth Circuit, by neglecting to apply these tests, failed to provide the proper level of deference to the agency's interpretations.

As a result of this blatant disregard for the precedent of this Court, the holding of the Ninth Circuit should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT FAILED TO ACKNOWLEDGE THAT THE TEXT OF SECTION 402 AND SECTION 404 OF THE CWA PROVIDES FOR SEPARATE AND DISTINCT PERMITTING PROCESSES.

The CWA expressly allows for the discharge of pollutants into the waters of the United States as long as the discharger holds a permit issued under one of the two permitting schemes established by the Act. 33 U.S.C. § 1311(a). The permitting schemes at

issue here are in Section 402 and Section 404 of the CWA. 33 U.S.C. §§ 1342, 1344.

Section 404 deals specifically with "discharge[s] of dredged or fill material" and requires that the Corps receive tacit approval from the EPA before it issues permits for such discharges. 33 U.S.C. § 1344(a). Under this scheme, Congress provided for the protection of water quality and the environment by requiring that all Section 404 permits comply with guidelines developed by the EPA in conjunction with the Corps ("Section 404(b)(1) Guidelines"). 33 U.S.C. § 1344(b)(1).

The other major permitting scheme, the Section 402 program, is administered by the EPA and allows the EPA to issue permits for the discharge of pollutants as long as the discharge complies with other expressly enumerated provisions of the CWA, such as Sections 301 and 306. 33 U.S.C. § 1342(a)(1). Section 301 requires that discharges from existing point sources comply with effluent limitations promulgated by the EPA. 33 U.S.C. § 1311(e). Section 306 requires that discharges from new sources comply with the EPA's technology-based "standards of performance" for that category of source. 33 U.S.C. § 1316(e).

After analyzing the statutory language, the Ninth Circuit held that fill material discharges, which fall under the Section 404 rubric, must comply, not only with the requirements of Section 404(b)(1), but also with the regulations in Sections 301 and 306, before a permit can be issued by the Corps under

Section 404. *Southeast Alaska Conservation Council*, 486 F.3d at 646-48. This conclusion was based primarily on the Ninth Circuit's analysis of Section 301(a), which provides that, "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342 [section 402], *and* 1344 [section 404] of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). The Ninth Circuit decided that "[t]he use of 'and' as a connector, instead of 'or,' indicates that Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under § 404." *Id.* at 646. In addition, the Ninth Circuit noted that Section 301(e) (33 U.S.C. § 1311(e)) applies to "all" discharges and Section 306(e) (33 U.S.C. § 1316(e)) applies to "any" discharge. *Id.*

These statutory clues, when viewed in a vacuum, would lend credence to the conclusion that fill material discharge must comply with Sections 301(e) and 306(e); however, the Ninth Circuit's rigid interpretation of the word "and" runs counter to the precedent of this Court, that holds that Congress often uses "and" and "or" interchangeably and that the meaning of the word in a particular case should be derived from the context. *See De Sylva v. Ballentine*, 351 U.S. 570 (1956) (holding that in the context of an inheritance statute "or" should be read as "and"); *United States v. Fisk*, 70 U.S. 445 (1865) (In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this,

courts are often compelled to construe "*or*" as meaning "*and*," and again "*and*" as meaning "*or*.").

Moreover, "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Brown & Williamson Tobacco*, 529 U.S. at 133 (quoting *Davis*, 489 U.S. at 809). As such, a court must "interpret the statute 'as a symmetrical and coherent regulatory scheme,'" *Id.* (citing *Gustafson*, 513 U.S. at 569). This is particularly true when, as here, a court is reviewing an agency's interpretation of a statute, because "'[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context . . . '" *National Ass'n of Home Builders*, 127 S.Ct. at 2534 (quoting *Williamson Tobacco Corp.*, 529 U.S. at 132-33). When Section 404 is viewed in the context of other statutory clues, it becomes clear that the statutory text overwhelmingly supports the conclusion that Section 404 permits for fill material discharges are issued independently from the regulations of Section 301(e) and Section 306(e).

A. The Text Of Section 402 Reveals That Section 402 And Section 404 Are Mutually Exclusive.

As the text of Section 402(a)(1) reveals, the two permitting schemes, Section 402 and Section 404, are mutually exclusive. Indeed, Section 402 expressly provides that the EPA may issue permits "[e]xcept as

provided in" Section 404. 33 U.S.C. § 1342(a)(1); *see also Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 n.14 (7th Cir. 2004) (a party whose activity is governed by the section 404 program "is not . . . subject to the [section 402] permitting requirements").

The determinative factor as to which of the two permitting schemes applies is whether the discharge will be "dredged or fill material" or some other pollutant. If the discharge is "dredged or fill material," then Section 404 is the exclusive permitting scheme. Indeed, this Court has explicitly stated that "[t]he Act . . . provid[es] a separate permitting program" for discharges of dredged or fill material, with Section 404 providing the regulatory scheme for such material. *Rapanos v. United States*, 547 U.S. 715, 745 (2006) (plurality opinion); *see also id.* at 760 (Kennedy, J., concurring) ("Apart from dredged or fill material, pollutant discharges require a permit from the Environmental Protection Agency . . . ").

In holding that a permit issued under Section 404 must also satisfy the requirements in Section 402, the Ninth Circuit effectively failed to give effect to this important provision of Section 402 itself. Astonishingly, the Ninth Circuit neglected to quote, cite, or even acknowledge the existence of Section 402(a)(1), which succinctly evinces the distinction between the two permitting schemes. This is particularly ironic, given that the Ninth Circuit admitted that courts "strive to avoid interpreting a statute 'in a manner that renders other provisions of the same

statute inconsistent, meaningless, or superfluous.'" *Southeast Alaska Conservation Council*, 486 F.3d at 647 (citing *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)); *Ratzlaf v. U.S.*, 510 U.S. 135, 140-41 (1994); *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

B. The Text Of Section 404 Reveals That Section 402 And Section 404 Are Mutually Exclusive.

The text of Section 404(p) expressly provides that "[c]ompliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance" with the primary permitting requirements of Section 301. 33 U.S.C. § 1344(p). Indeed, the EPA and the Corps, in a joint *amicus* brief at the Seventh Circuit, explained that the "discharge of pollutants other than dredged or fill material are generally regulated under section 402 . . . [whereas] [d]ischarges of dredged or fill material are generally regulated under section 404." *Greenfield Mills*, 361 F.3d at 946 n.14 (citing Brief of United States Environmental Protection Agency and United States Army Corps of Engineers as *Amici Curiae*, *Greenfield Mills*, 361 F.3d at 946 n.14 (brief located at 2003 WL 22733948)).

Nonetheless, in holding that a permit issued under Section 404 must also satisfy the requirements in Section 402, the Ninth Circuit effectively failed to

give effect to Section 404(p). As a result, the holding of the Ninth Circuit should be reversed.

II. THE NINTH CIRCUIT DECISION MUST BE REVERSED; IT VIOLATED TWO WELL-ESTABLISHED TENETS OF ADMINISTRATIVE LAW.

Section 404 of the CWA specifically provides for the issuance of permits "for the discharge of dredged or fill material into . . . navigable waters . . . " Thus, the applicability of Section 404 depends on the definition of "fill material."

On May 9, 2002, the Corps and the EPA published joint regulations to "clarify the Section 404 regulatory framework" and to adopt uniform definitions of "fill material" and "discharge of fill material." 67 Fed. Reg. 31,129, 31,130 (May 9, 2002). Under these regulations, "fill material" is defined as "material placed in the waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e) (Corps definition); 40 C.F.R. § 232.2 (EPA definition). The two agencies also defined "discharge of fill material" to include the discharge of "overburden, slurry, or tailings or similar mining-related materials[.]" 33 C.F.R. § 323.2(f) (Corps definition); 40 C.F.R. § 232.2 (EPA definition).

Importantly, the agencies explained that "[p]ersons or entities that discharge material to waters of the U.S. that has the effect of replacing any

portion of a water of the U.S. with dry land or changing the bottom elevation of any portion of a water of the U.S. could be regulated by [section 404]." 67 Fed. Reg. 31,129, 31,135 (May 9, 2002). Indeed, the "EPA has never sought to regulate fill material under effluent guidelines [under section 402]." *Id.* More specifically, the agencies explained that "any mining-related material that has the effect of fill when discharged will be regulated as 'fill material'" under section 404 of the CWA. *Id.*

This is consistent with the agencies' historical application of the CWA. In 1983, for example, the EPA explained that "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA" specifically "do not require [section 402] permits." 40 C.F.R. § 122.3.

Interpreting its own regulations, the Corps determined that Coeur Alaska's placement of mine tailings at the bottom of a Lower Slate Lake would be a discharge of "fill material." This determination was based on the fact that the placement of mine tailings at the bottom of the lake would "chang[e] the bottom elevation" of the lake. Accordingly, the Corps, with the concurrence of the EPA, issued a Section 404 permit to Coeur Alaska.

SEACC sought judicial review of the Corps' issuance of the permit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* The District Court rejected SEACC's challenge to the Corps' permitting decision, upholding the Corps' and

the EPA's regulations that define the terms "fill material" and "discharge of fill material" under the principles announced in *Chevron*, 467 U.S. at 842-43. Memorandum Decision, J.A. 53a. The District Court upheld the Corps' interpretation that these valid regulations authorized the issuance of the permit holding that substantial deference must be accorded to an agency's interpretation of its own regulations. *Id.* at 8-11.

The Ninth Circuit, however, reversed the District Court and remanded with instructions to vacate the Section 404 permit. *Southeast Alaska Conservation Council*, 486 F.3d at 655. In so doing, either the Ninth Circuit was rejecting the agencies' interpretation of the CWA by effectively rewriting the regulation itself or else the Ninth Circuit was rejecting the Corps' interpretation of its own regulation. Both actions are contrary to the well-established jurisprudence of this Court.

A. By Rejecting The Agencies' Interpretation Of The CWA And Effectively Rewriting The Regulation, The Ninth Circuit Decision Conflicts With *Chevron*.

1. *Chevron* requires deference to accountable agencies.

This Court has long required that deference be accorded to an agency's interpretation of a statutory scheme it is entrusted to administer. *See, e.g.*, *Brown v. United States*, 113 U.S. 568, 570-71 (1885); *United*

States v. Shimmer, 367 U.S. 374, 381-83 (1961). In *Chevron, supra,* this Court established the now universally recognized two-step analysis that a reviewing court must perform in order to implement this principle of deference:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-44 (footnotes omitted). Thus, if Congress' "silence" or "ambiguity" has "left a gap for the agency to fill," a court must defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Id.* at 842-43.

The deference required by *Chevron* is based on the principle that courts are not in a position to second guess an agency's interpretation of a congressional mandate where there is an ambiguity as to the legislative intent or where Congress intentionally left

an issue to the discretion of the agency. As Justice Stevens wisely explained:

> Judges are not experts in the field, and are not part of either political branch of the Government. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within the gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect the legitimate policy choices made by those who do.

Id. at 865-66. This approach minimizes judicial interference with the democratic accountability of the executive branch, and has been applied by this Court recently in a case interpreting the CWA. *See National Ass'n of Home Builders*, ___ U.S. ___, 127 S.Ct. 2518 (2007).

The EPA and Corps are much more knowledgeable than the courts in the areas of environmental protection and regulation as well as the area of

mining practices, and are charged with considering a variety of factors in issuing permits, including the effect of disposal of pollutants on human health or welfare, marine life, esthetic, recreation, and economic values, other possible locations and methods of disposal, and the effect on alternate uses of the water, such as mineral exploitation. 33 U.S.C. § 1343(c) (cross-referenced by 33 U.S.C. § 1344(b) as the type of criteria upon which Section 404 guidelines should be based). These factors put these agencies in the best position to achieve balance between the competing interests in the discharge of pollutants and fill material. Congress left a "gap" in the statute for the expertise of the agency to fill, and the courts must defer to agency rulemaking that fills that gap and is not contrary to any clearly expressed congressional intent.

2. The instant case is on all fours with *Chevron*, requiring deference from the Ninth Circuit.

This case fits neatly within the scope of the *Chevron* decision. In *Chevron,* the statute at issue was the Clean Air Act, which regulated, but did not define, "stationary sources" of pollution, rather than the Clean Water Act. The EPA defined a "stationary source" as including all pollution emitting activities belonging to the same industrial grouping, and this Court held that the lower court should have deferred to that definition. *Id.* at 840-41. In the instant case, Congress similarly passed a statute for the regulation of "fill material" entering waters of the United States,

the EPA promulgated a definition of "fill material," and the courts should defer to that definition. Indeed, SEACC did not challenge the validity of the definition itself. *Southeast Alaska Conservation Council*, 486 F.3d at 651, n.12.

Nonetheless, the Ninth Circuit effectively rewrote the regulations because they did not conform to the Ninth Circuit's novel interpretation of the highly technical and complex provisions of the CWA. Specifically, the Ninth Circuit held that discharges that squarely fell within the Corps' and the EPA's definition of "fill material" could not actually be considered "fill material" if those discharges were also subject to an EPA effluent limitation or standard of performance. *Id.* at 646-48. Thus, after the Ninth Circuit's radical decision, the agencies' joint definition of "fill material" now essentially reads:

> The term "fill material" means material placed in waters of the United States where the material has the effect of . . . changing the bottom elevation of any portion of a water of the United States, *unless the material may also be subject to an EPA effluent limitation or standard of performance.*

For all practicable purposes, the Ninth Circuit invalidated carefully crafted joint regulations of the Corps and the EPA and replaced them with its own rule. This replacement effectively eviscerates the congressionally authorized role of the Corps in regulating the waters of the United States because the EPA now will have permitting authority over any

discharge that may fall within a performance standard or effluent limitation applicable under Section 402 of the CWA.

In *Chevron*, however, this Court held that a reviewing court may invalidate regulations duly promulgated by the agency charged with administering a statute only "if Congress has spoken to the precise question at issue" and the agency's regulation directly conflicts with "the unambiguously expressed intent of Congress." 467 U.S. at 842-43. Here, Congress was silent as to meaning of the operative terms in Section 404, *i.e.*, "fill material" and "discharge of fill material." Its silence on the meaning of these terms indicates that Congress implicitly granted authority to the Corps and the EPA to fill this "gap." *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 441-44 (4th Cir. 2003) (concluding that Congress's silence on the definition of "fill material" created an ambiguity for the Corps and the EPA to resolve).

Although the Ninth Circuit recognized that Congress had not "spoken to the precise question at issue" and, thus, left a "gap" for the Corps and the EPA to fill, *see Southeast Alaska Conservation Council*, 486 F.3d at 649, the Ninth Circuit effectively invalidated the joint regulations under step one of *Chevron*. 467 U.S. at 644-48. Moreover, by holding that Section 301 requires compliance with Sections 402 *and* 404, rather than deferring to the agencies' permissible construction of Section 301 as requiring compliance with Section 402 *or* Section 404 (*see*

section I, *supra*), the Ninth Circuit brazenly ignored this Court's well-reasoned rule in *Chevron*.

B. By Rejecting The Corps' Interpretation Of Its Own Regulation, The Ninth Circuit Decision Conflicts With This Court's Holding In *Seminole Rock*.

Alternatively, in ordering the Section 404 permit to be vacated, the Ninth Circuit effectively ruled that the Corps erroneously interpreted its own regulatory definition of "fill material" in issuing the permit. *Southeast Alaska Conservation Council*, 486 F.3d at 648-653. In so doing, the Ninth Circuit violated a tenet of administrative law older than *Chevron*.

Over sixty years ago, in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945) (emphasis added), this Court articulated the now well-known rule of deference to an agency's interpretation of its own regulations:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . *[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.*

This deference principle has been followed consistently by this Court. *See, e.g., National Ass'n of Home*

Builders, 127 S.Ct. at 2537-38; *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *United States v. Larionoff*, 431 U.S. 864, 872 (1977). Adherence to this deference principle is especially important when, as in the instant case, an agency is charged with administering "'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

Under *Seminole Rock*, when a court reviews an agency's interpretation of its own regulations, its analysis is similar to that which it performs when reviewing an agency's construction of statute under *Chevron*. Scott H. Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 70-71 (2000). The first step is to determine whether the regulation is unambiguous. *Id.* If the regulation is unambiguous, a court will uphold an agency interpretation that is consistent with the unambiguous regulatory language. *See id.*; *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (according no deference to an agency's interpretation that conflicted with its unambiguous regulation); *Wards Cove Packing Corp. v. National Marine Fisheries Service*, 307 F.3d 1214, 1219-20 (9th Cir. 2002) (same); *Thomas Jefferson University*, 512 U.S. at 512-18 (upholding an agency's interpretation of an unambiguous regulation). If,

however, the regulation is ambiguous, then a court must proceed to the second step and defer to the agency's interpretation, unless that interpretation "is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-414; Angstreich, 34 U.C. Davis L. Rev. at 70-71.

In the instant case, neither SEACC nor the Ninth Circuit suggested that the Corps' definition of the term "fill material" was ambiguous. This is not surprising because the language in the regulation could not be clearer: "fill material" means "material placed in the waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e). In fact, the Ninth Circuit ruled that the proposed discharge in this case "facially" satisfied the Corps' definition of "fill material" "because it would have the effect of raising the bottom elevation of the lake." *Southeast Alaska Conservation Council*, 486 F.3d at 644. This ruling, in and of itself, should have resulted in the Ninth Circuit affirming the District Court.

The Ninth Circuit, however, failed to follow the *Seminole Rock* analysis. Instead, the Ninth Circuit erroneously looked at snippets of regulatory history and then concluded that the Corps could not have meant what it wrote in its regulatory definition of "fill material." *Southeast Alaska Conservation Council*, 486 F.3d at 648-53. Yet, it is axiomatic that, when the language of a statute is unambiguous, a court may not look to the legislative history in an effort to create

an ambiguity. *Ratzlaf*, 510 U.S. at 147-49 ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). If a court may not look to the legislative history in an effort to create an ambiguity in a statute, *a fortiori*, a court may not look to the regulatory history in an effort to turn an unambiguous regulation into an ambiguous one. *See United States v. Hagberg*, 207 F.3d 569, 574 (9th Cir. 2000) (statements in the regulatory history cannot alter the meaning of an unambiguous regulation); *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) ("[L]anguage in the preamble of a regulation is not controlling over the language of the regulation itself.") (quotation omitted).

In any event, even if the Ninth Circuit had been correct in its consultation of the regulatory history in an attempt to find ambiguity, that ambiguity would simply require the Ninth Circuit to apply step two of the *Seminole Rock* analysis. Angstreich, 34 U.C. Davis L. Rev. 49, 70-71. Under step two, a reviewing court must give "controlling weight" to an agency's interpretation of an ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-14.

Here, the Corps' interpretation of its own regulations, as demonstrated by its issuance of the Section 404 permit, was neither "plainly erroneous" nor "inconsistent" with its definition of "fill material." This is especially true considering that it is undisputed that placement of mine tailings at the bottom

of the lake "would have the effect of raising the bottom elevation of the lake." *Southeast Alaska Conservation Council*, 486 F.3d at 644. However, instead of giving "controlling weight" to the Corps' interpretation of its own regulation as mandated by *Seminole Rock*, the Ninth Circuit substituted its judgment for that of the Corps. *See Southeast Alaska Conservation Council*, 486 F.3d at 652-53 ("the current fill rule only applies to those tailings or other mining-related materials that are not subject to effluent limitation or standards of performance.").

CONCLUSION

This Court should reverse the decision of the Ninth Circuit.

Respectfully submitted:

WILLIAM PERRY PENDLEY*
**Counsel of Record*
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorney for Amicus Curiae

September 24, 2008